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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ELMER JONES, Defendant and Appellant.	B210711 (Los Angeles County Super. Ct. No. YA069449)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Elmer Jones was charged by information with possession for sale of cocaine base (Health & Saf. Code, § 11351.5). The information alleged, among other prior convictions, three prior Strikes (Pen. Code, §§ 1170.12, subds. (a) - (d), 667, subds. (b) - (i)) and two prior narcotics convictions (Health & Saf. Code, §§ 11370.2, subd. (a)). The prosecution elected to pursue the case as a second strike case.

On the date of trial, defendant's case was sent to Department F of the Southwest District of the Los Angeles Superior Court for trial, where defendant made a motion for substitution of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The court in Department F denied the motion, and, following defendant's rejection of the prosecution's plea offer, transferred the case to Department C, which had just become open for trial. There, following lengthy discussion, defendant entered an open plea to the court, pleading no contest to the charge of possession for sale of cocaine base and admitting two strikes (though only one would be considered for the purpose of sentencing).

More than three weeks later, on the date set for the sentencing hearing in Department C, defendant made a second *Marsden* motion because his attorney refused to bring a motion to withdraw the plea. The court denied the *Marsden* motion, but then permitted defendant to represent himself for the purpose of making a motion to withdraw his plea, and denied that motion as well. The court then reappointed counsel for the purpose of sentencing. The court granted defendant's motion to strike one strike, also struck the prior narcotics convictions, and sentenced defendant to eight years in state prison (double the four-year middle term for possession for sale of cocaine base).

The court granted defendant a certificate of probable cause to appeal from the judgment. On appeal, defendant raises no contention regarding the denial of

his pre-plea *Marsden* motion in Department F. Rather, he challenges only the later proceedings in Department C. His contentions are somewhat ill-defined. As best we can tell, he contends that the trial court in Department C denied him his right to make an effective motion to withdraw his no contest plea by conducting an inadequate post-plea *Marsden* inquiry, by denying his post-plea *Marsden* motion, by failing to inquire of counsel why he would not bring a motion to set aside the plea, and by forcing defendant to make his motion to withdraw the plea in pro. per. without granting a continuance. We affirm.

BACKGROUND

According to the testimony at the preliminary hearing, Deputy Sheriff Terence Peterson observed defendant make five hand-to-hand transactions at an address on Vermont Avenue. Defendant would pick up a black plastic grocery bag from the gutter in front of the location, retrieve an item from the bag, replace the bag, and complete the transaction. Believing that defendant was selling narcotics, Deputy Patterson detained defendant and recovered the grocery bag from the gutter. Inside the bag were 95 pieces of rock cocaine, two large bags of marijuana, and one smaller bag of marijuana. On defendant's person, Deputy Patterson found two cell phones, $195 dollars in miscellaneous denominations, and no paraphernalia for smoking rock cocaine. In Deputy Patterson's opinion, defendant possessed the cocaine in the grocery bag for the purpose of sale.

DISCUSSION

We discuss defendant's contentions on appeal by reviewing each procedural stage of the case in chronological order.

I. *The June 16 Pre-Plea Marsden Motion in Department F, and Defendant's No Contest Plea in Department C*

A. *Proceedings*

On the afternoon of June 16, 2008, defendant's case was sent to Department F for trial. The prosecution had offered to permit defendant to plead guilty to the charge of possession of cocaine base for sale and to admit one strike in exchange for a sentence of eight years (double the mid-term of four years).

Before jurors were summoned, appointed defense counsel informed the court that defendant wished to make motion for the substitution of new appointed counsel under *Marsden.* The court in Department F excused the prosecutor from the courtroom and conducted a *Marsden* hearing. Defendant complained about three things concerning his attorney's performance. First, he complained that his attorney had not contacted three potential witnesses who were detained along with defendant. According to defendant, "I've been trying to get these guys to come to court to testify . . . because the way the officer is making it sound like, they seen me make sales of drugs and they came and got me and the drugs and we went on to the police station. And that wasn't true. These guys [are] my witness[es] because they put all four of us in the police car and searched one of the other guy's car." Defendant explained that one proposed witness "told me a police officer searched his car and everything. He's really the main one that I needed to come to court to show that when the police officers came up, they was only arresting us to see – in our neighborhood they see . . . if it's gang bangers or anything and they just search people." Defendant stated that had given defense counsel the first names of the witnesses and the phone number of his fiancée who knew the phone numbers of all the witnesses.

Second, defendant complained that he was being inadequately represented "as far as going to trial or not [because] he's telling me already that it don't look like I have a chance to even win the case." Third, he complained that his attorney had not moved to dismiss the information under Penal Code section 995 and had not moved to suppress evidence under Penal Code section 1538.5.

Defense counsel responded that he found no grounds for making motions under sections 995 and 1538.5. He further explained that he had advised defendant that he should accept the prosecution's plea offer "because of the substantial exposure that he faces in the event he's convicted," and because "he's an underdog at trial [with] more chance of losing than . . . of winning." Concerning the potential witnesses, counsel said that he did not have an investigator working on the case. However, he had "spent a substantial amount of time hoping to get in touch with these witnesses." His "understanding [was] that they are acquaintances of [defendant], friends of his, but he doesn't know the last names of two of them." Defendant had informed him of the possible witnesses "a couple weeks ago. Maybe a little longer than that." Defense counsel had recently called defendant's fiancée, who told him that one of the witnesses (identified by first and last names) lived at the same location she did, could be contacted at that telephone number, and would get in touch with him. However, that witness had not contacted counsel. As to the other two witnesses, defendant's fiancée said that she believed she had possible last names or telephone numbers for them. Defense counsel asked her to call back with the information, but she had not done so.

The court denied defendant's *Marsden* motion "because it seems to me that [defense counsel] has . . . attempted to locate the witnesses that you suggested; . . . has considered the motions that you've asked him to file . . . and believes that they are not well-taken. . . . And . . . in terms of him suggesting to you to accept the

offer, again, that's very common. You know that you are facing a third strike – possible third strike if you were to be convicted and the prior convictions were found true."

Following the court's denial of the *Marsden* motion, defendant rejected the prosecution's offer, stating: "I would rather try and prove my innocence. I didn't do that." The case was then transferred for trial from Department F to Department C, where it had originated and which had just become open for trial.

When the parties arrived in Department C later on the afternoon of June 16, 2008, the court in that department announced that jurors were waiting outside and that it wished to learn the background of the case before starting the trial. The prosecutor then briefly outlined his evidence. He explained that he was proceeding as if it were a second strike case, that defendant's maximum exposure in a second strike case was 21 years, and that defendant had rejected the plea offer of eight years (admitting one strike and receiving double the mid-term).

Thereafter, lengthy discussions occurred concerning the risks to defendant of going to trial and whether defendant would accept a different disposition suggested by the court (a term of seven years without admitting a strike). Initially, in statements communicated through his attorney and in statements he made to the court directly, defendant repeatedly maintained his innocence and expressed his desire to go to trial. Ultimately, however, he changed his mind and agreed to accept the disposition proposed by the court. After a recess, the prosecutor informed the court that his superiors would not authorize him to offer the court's suggested disposition. The court then left the bench to telephone the prosecutor's supervisors. When proceedings resumed, the court stated: "I talked to everyone down there. Eight it is. They took eight off the table last time anyway,"

apparently referring to the prosecution's withdrawal of the eight-year offer following defendant's rejection of it earlier in the afternoon in Department C.

Defense counsel then asked what would happen if defendant pled open to the court. The court stated that because of his prior record, he would have to plead open, understanding that he would receive at least eight years. After conferring with his attorney, defendant agreed to plead open to the court.

The prosecutor then took the waivers. Defendant pled no contest to the charge of possession for sale of cocaine base and admitted two strikes. Concerning his possible punishment, he was informed that the court made no promises as to what his sentence would be, but that he could receive up to 21 years (the maximum second strike sentence). The court put the matter over for sentencing.

B. *Analysis*

On appeal, defendant does not challenge the ruling of the court in Department F denying his pre-plea *Marsden* motion, and he has thus forfeited any claim that the court in Department F erred in that ruling. Rather, all his challenges relate to his post-plea *Marsden* motion and other proceedings in Department C more than three weeks later, which we discuss in the next section of our opinion. Nonetheless, we discuss the pre-plea *Marsden* proceeding in Department F because it demonstrates that any error in the later handling of defendant's post-plea *Marsden* motion in Department C was harmless beyond a reasonable doubt.

The reason defendant does not contest the ruling on his pre-plea *Marsden* motion is clear: the court in Department F permitted him to state his reasons for asserting his attorney was ineffective, allowed defense counsel to respond, and concluded (appropriately) that defendant had failed to meet his burden of demonstrating that he was entitled to the substitution of counsel. Immediately after

the court in Department F denied the motion, concluding that defendant had failed to demonstrate his attorney was ineffective, the case was transferred to Department C, where defendant entered his no contest plea later that afternoon. More than three weeks later, on the date ultimately set for sentencing, defendant made his post-plea *Marsden* motion in Department C. As we explain in greater detail below, although conducted in a separate proceeding and before a different judge, this post-plea motion in Department C was in substance a renewal of the pre-plea motion defendant had already made in Department F. That is, the post-plea motion was based on two of the same grounds as the pre-plea motion: that defendant's attorney had advised defendant that he would likely lose at trial and that defense counsel had failed to secure the attendance of defendant's proposed witnesses. But those grounds had already been rejected by the court in Department F at the pre-plea *Marsden* hearing shortly before defendant's no contest plea in Department C.

Thus, the record on appeal contains a finding, unchallenged by defendant, that when defendant entered his no contest plea he was not entitled to new counsel, because his attorney was not ineffective. In his post-plea *Marsden* motion, defendant raised nothing new regarding his attorney's alleged incompetence. Therefore, the record affirmatively demonstrates that any error in the handling of defendant's post-plea *Marsden* motion by the trial court in Department C – a motion that was no more than a reassertion of the pre-plea motion in Department F -- was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36; see *People v. Mack* (1995) 38 Cal.App.4th 1484, 1487-1489 [failure to conduct post-trial *Marsden* hearing was harmless beyond a reasonable doubt and no remand was required where appellate counsel unsuccessfully contested trial counsel's competence in appellate briefing and in habeas corpus petition]; cf. *Marsden, supra,* 2 Cal.3d at p. 126 [trial court's error in failing to permit defendant

to "catalogue[] acts and events beyond the observations of the trial judge to establish the incompetence of his counsel" constituted reversible error because court could not "conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction"].)

In any event, as we now explain, the court in Department C did not err in handling defendant's post-plea *Marsden* motion.

II. *The July 11 Post-Plea Marsden Hearing in Department C*

A. *Proceedings*

On the original date for sentencing in Department C, defense counsel was unavailable and stand-in counsel requested a continuance, which the court in Department C granted. Defendant informed the court that he "had a change of heart" and "wanted to just go ahead and go to trial." The court replied that defendant had to discuss that issue with his attorney. Defendant informed the court that one of his witnesses was present in court. The court ordered the witness to appear on the continued date for the sentencing hearing.

On July 11, 2008, the continued date for the sentencing hearing, defense counsel stated that he could not represent defendant in moving to withdraw his plea, and that defendant wished to make a *Marsden* motion. After the court excused the prosecutor, the court asked defendant "what is your attorney doing that he should not be doing? Or what should he be doing that he is not?" Defendant said that he was trying to get his witness to come to court and was trying to provide all the information he could think of to prove his innocence. He added: "I just feel like I need to be able to go to trial in order to prove my innocence. I had a witness come to court," though the witness had not appeared as ordered.

The court explained: "You already took a plea. And you said during the plea that you were okay with that. You didn't mention anything else about any other conditions. [Defense counsel] said he can't bring this motion because he can't do it in good faith. And you want him removed because he won't bring that motion. So why should he bring that motion after you took a deal in this?"

Defendant replied that he "wasn't being counseled fair." The court asked him to explain. Defendant stated: "I was under the influence that . . . I didn't have no choice of going to be able to win the case on some fact that these jurors are going to believe a police [officer] before me because of my record. I was saying that my record doesn't have anything to do with the case." The court explained that defense counsel correctly informed defendant that the jury could consider certain of his prior convictions – robbery, grand theft, and sale of narcotics – on the issue of his credibility.

Defendant next complained: "I didn't have my witness. Wasn't in court at all. And my witness had came to court [] the last time I came to court, when [defense counsel] wasn't here. . . . He is one of the guys that the officers put in the police car. . . . My fiancée told me that the guy . . . said no one ever tried to contact him. And [defense counsel] said he tried to contact these people and he couldn't get a hold of nobody. But he said nobody never tried. He ain't never had no call. And I provided [defense counsel] with phone numbers."

The court then addressed defense counsel, who explained that he had called the telephone numbers defendant had provided for his witnesses "and I was unable to get any response on those numbers. I didn't have last names, and I didn't have addresses." Defendant then added: "I didn't know their last name[s]. I just knew their [first] name[s]."

Defense counsel stated: "If [defendant] wishes to make a motion to set aside that plea, as I've indicated, he is going to have to get other counsel to do that. I think that is really the basis of why he is making this *Marsden* motion, that he wants an attorney to file or to represent him on his motion to set aside the plea. Is that correct?" Defendant replied, "Yes."

The court denied the request for new counsel, stating: "I don't think that [defense counsel] should be removed. If you are saying that those are the only reasons that you wanted this plea set aside, I don't see it as a reason, because" in waiving his rights and pleading no contest, defendant stated, inter alia, that he had had sufficient time to review the charges and possible defenses with defense counsel and did not state that he had any reservations about the plea.

B. *Analysis*

Defendant contends that the court conducted an inadequate post-plea *Marsden* inquiry, thereby denying him the right to counsel for the purpose of making a motion to withdraw his no contest plea. In particular, defendant faults the trial court for failing to inquire as to the substance of the testimony that would be given by defendant's proposed witnesses. We disagree.

"The governing legal principles [derived from *Marsden, supra*] are well settled. 'Under the Sixth Amendment right to assistance of counsel, """[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."""" [Citation.] Furthermore, """"When a defendant seeks to discharge appointed counsel and substitute another attorney, and asserts inadequate representation, the

trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance."'" [Citation.] '"[S]ubstitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel." [Citations.]'" (*People v. Valdez* (2004) 32 Cal.4th 73, 95.)

Here, at the post-plea *Marsden* hearing, the court permitted defendant to explain his complaints and relate specific instances of his attorney's performance. The court also heard from defense counsel as relevant to defendant's claims. No more was required.

Defendant contends that under *People v. Stewart* (1985) 171 Cal.App.3d 388 (*Stewart*), the trial court was required to ask defendant the substance of the testimony to be given by his proposed witnesses. In *Stewart,* the defendant had been convicted at trial and complained that "he had 'two witnesses on the fourth floor' who should have testified." (*Stewart, supra,* 171 Cal.App.3d at p. 398.) The court of appeal held: "The trial court did not inquire into the substance of the witnesses' expected testimony, but instead denied the motion without endeavoring to learn whether the testimony might have been material or even crucial and without appointing new counsel to assist the court in this regard. We believe this constituted error." (*Ibid.*)

In *People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*), the California Supreme Court overruled *Stewart* to the extent it suggested that a post-conviction *Marsden* motion is subject to a lesser standard for substitution of counsel than a pre-conviction *Marsden* motion. Rather, the standard for substitution under *Marsden* is the same regardless of when the motion is made. Moreover, *Stewart* is distinguishable from the instant case on its facts. There, the complaint was that

defense counsel had failed to call witnesses at trial. In that context, and given defendant's claim that the two witnesses were then readily available, the court of appeal held that the trial court should have inquired as to the witnesses' expected testimony. In the present case, by contrast, defendant's complaint was that his attorney had failed to make diligent efforts to locate his proposed witnesses before he entered his no contest plea. Defense counsel responded to that complaint by explaining that he had called the telephone numbers defendant had provided for his witnesses "and I was unable to get any response on those numbers. I didn't have last names [because defendant did not know them], and I didn't have addresses." Thus, defense counsel addressed the specific complaint made by defendant, and the court could properly exercise its discretion to deny the *Marsden* motion without inquiring into the witnesses' proposed testimony. Nothing in *Stewart* suggests to the contrary.

Defendant next complains that the trial court in Department C abused its discretion in denying his post-plea *Marsden* motion. Relying not on defendant's complaints as made at the *Marsden* hearing, but on other matters present in the record,[1] defendant contends that further inquiry by the court would have shown that defendant's attorney "took no steps to investigate and prepare a defense, which

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[1] For instance, based on statements made by the court and defendant on June 16 before the plea, defendant contends "that the trial court was familiar with appellant's case to the extent appellant denied making any transactions, proclaimed his innocence, but had no witnesses nor any way to refute the officer's testimony, except by his own testimony which would be impeached by a long felony record." Defendant asserts that the trial court should have been aware that "[i]n the file . . . was a *Pitchess* motion, which had been taken off calendar and not reset. The motion failed to set forth any of the requisites for obtaining police officer information." He also argues that the court should have considered the fact that "[d]uring the months this case lingered because of the many continuances taken by defense counsel, as reflected in the minutes of the court file, defense counsel did not file a discovery motion or issue a subpoena for records which would have given him the last names and addressed of [the possible] witnesses."

put appellant in the situation he described as having no choice but to" plead no contest. According to defendant, "[t]he trial court abused its discretion in denying appellant's motion in that it arbitrarily and capriciously ignored the evidence before it and refused to apply the applicable law."

Defendant's contention misconceives the role of the court in considering a request under *Marsden* for substitution of appointed counsel. "'[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.' [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1320.) Of course, the nature of the court's inquiry necessarily depends on the nature of the defendant's claims. But no case has suggested that the trial court must scour the record in the manner suggested by defendant in search of possible evidence of ineffective assistance of counsel. Here, the court did not abuse its discretion in the extent of its inquiry, or in its conclusion that defendant failed to demonstrate that "a failure to replace the appointed attorney would substantially impair the right to the assistance of counsel." (*Smith, supra*, 6 Cal.4th at p. 696.)

III. *The July 11 Granting of Pro. Per. Status and the Motion to Withdraw the Plea*

A. *Proceedings*

After the court in Department C denied defendant's post-plea *Marsden* motion, proceedings resumed with the prosecutor present. The court noted that the next issue was whether defendant "wants to go pro. per. [or] hire other counsel, [and] whether . . . the sentencing [hearing] should be delayed . . . to make a motion to withdraw a plea." The prosecutor objected to any continuance: "Our witness

[referring to Deputy Erik Harris, who was present when the prosecutor had spoken to defendant's proposed witness on the last court date] has been brought in at the last minute for this, and we are ready to go today. This is the day of the hearing, and if he wants to represent himself, maybe the court should let him represent himself today."

The court then asked defendant if he wanted to represent himself on a motion to withdraw his plea. Defendant responded that he did. The court noted that it was "not going to delay this hearing," and told defendant that on appeal he could challenge the competence of his trial counsel. Defendant conferred with his attorney, after which the attorney stated that defendant "indicated . . . that he wants to, as he phrases it, take back his plea and that he is ready to argue that matter to the court." The court asked: "So he is going pro.per. for that?" Defendant replied, "Yes."

The following proceedings then occurred:

"THE COURT: Understand you do have a right to counsel? We have gone over these rights with you before. You also have a right to represent yourself. That will not delay this hearing. And also the issue I think you want to bring out can as easily be raised on appeal, which the transcript of the plea is still here and remains the same. That is what you are going to argue now. Understanding your right to representation, you are waiving that at this point to argue on your own; is that correct?

"THE DEFENDANT: Yes.

"THE COURT: All right. You are in pro. per. Your motion."

Defendant then explained: "I just want to be able to prove my innocence in this. I mean, I have been locked up right now for something I didn't do. And I can't even sleep. You know, the whole thing of me just to considering taking a

deal was, you know, having me think that I am going to lose either way it goes. So, I mean, a person up against the wall like that, you don't, you know, you figure you might as well take the less time as possible, you know. Twenty years is, like you said, is a long time, you know. And I ain't gonna do 20 years for something I didn't do.

"I have no witness. I didn't have nobody in court for me. So my witness, I finally got a hold of my witness and he came to court that last time I came to court. And he stood up and said his name and everything.

"He is one of the guys that was in the police car. There was four guys, me and three other guys. And he is one of the guys that when the police put him in the police car, and he can testify what happened, what the police done. And that, you know, I have been trying to prove myself.

"[Defense counsel], I give him all the information I can think to prove my innocence in this case. So I feel like now that I got him, we can't think alike. You know, he says he knows what happened.

"I will tell the court what happened. They were deceitful, everything that they say, this is false in this case, whole case."

The prosecutor opposed the motion, arguing that defendant's plea was voluntary. He also stated that in the presence of his witness, Deputy Harris, he had spoken to defendant's proposed witness on the last court date. According to the prosecutor, "this person told me that he did not observe what [defendant] was doing prior to being arrested and, in my opinion, didn't make any kind of exculpatory statements. He was just present. He was present at the scene at the time of the arrest." The prosecutor invited the court hear from Deputy Harris, who was present.

The court then denied defendant's motion: "The only issue . . . is whether or not the plea should be withdrawn because there was a problem with the plea, there was something that he didn't understand about it, there was some misrepresentation. And I find none of that here. The transcript will speak for itself. All charges were discussed with him, consequences of the plea, his rights to a trial. And there was no hesitation. And there was a lot of discussion prior to this plea being taken. The presumption has to be in favor – the presumption is in favor of the plea standing, unless there is some reliable information that the waivers taken can't be trusted or that they were given under false pretense or under some misunderstanding or misrepresentation. None of that was there. The motion is denied."

At defendant's request, the court reappointed counsel to represent defendant for sentencing. The prosecutor then called Deputy Harris to testify concerning circumstances in aggravation relating to defendant's crime. The court thereafter sentenced defendant to eight years – double the midterm for possession for sale of cocaine base – and struck all defendant's prior convictions but one prior strike.

B. *Analysis*

Defendant contends that before relieving counsel of the obligation to make a motion to withdraw his plea, the court erred by failing to inquire why defense counsel refused to bring such a motion. We disagree. In *People v. Brown* (1986) 179 Cal.App.3d 207, the court held, in substance, that counsel is required to bring a motion to withdraw a plea at the client's urging, unless "in counsel's good faith opinion, [the motion] is frivolous or when to do so would compromise ethical standards." (*Id.* at p. 216; see *People v. Makabali* (1993) 14 Cal.App.4th 847, 851.) Here, defendant wished to withdraw his plea on the ground that his attorney

was ineffective. In such a situation, as the trial court clearly understood (it noted that defense counsel could not bring the motion "in good faith"), counsel is not obliged to make a motion to withdraw the plea, because to do so would create a conflict of interest. (*People v. Garcia* (1991) 227 Cal.App.3d 1369, 1377, overruled on another point in *Smith, supra*, 6 Cal.4th at p. 696.) Rather, in that situation, a defendant is entitled to new counsel to investigate the possibility of making such a motion on the ground that prior counsel was ineffective, *if* defendant can establish sufficient grounds for substitution of counsel under *Marsden.* (*Smith, supra,* 6 Cal.4th at p. 696.) In the present case, as we have noted, defendant failed to do so. He therefore was not deprived of the right to counsel in making a motion to withdraw his plea. (*Ibid.*)

Defendant also appears to assert that his waiver of the right to counsel was not voluntary, because he had no choice if he wanted to make his motion to withdraw his plea. However, defendant chose the only legal option open to him if he wished to make his motion. As we have explained, he was not entitled to have a new attorney appointed to investigate such a motion. That he had no other legal option does not mean that his waiver of the right to counsel was not voluntary.

Defendant apparently contends that his waiver of the right to counsel was not voluntary because the trial court "refus[ed] to grant a continuance so that appellant could get his witness back in court." However, defendant was not entitled to a continuance. Having failed under *Marsden* to articulate adequate grounds on which to obtain new counsel to investigate the possibility of making a motion to withdraw his plea, he also failed to demonstrate good cause for a continuance for him to make such a motion in pro. per. Further, when asked by the court if he wanted to represent himself on a motion to withdraw his plea, he said he did. Later, after defendant conferred with his attorney, the attorney informed the

court: "He has indicated to me, Your Honor, . . . that he wants to, as he phrases it, take back his plea and that he is ready to argue that matter to the court." We conclude that his decision to represent himself was not rendered involuntary by the lack of a continuance.

Defendant contends that he presented adequate grounds to withdraw his plea and that the court erred in denying his motion. Under Penal Code section 1018, a defendant may move the trial court to set aside a guilty plea for good cause at any time before the entry of judgment. "'Good cause' means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment and must be shown by clear and convincing evidence. [Citation.] The grant or denial of such a withdrawal motion is 'within the sound discretion of the trial court and must be upheld unless an abuse thereof is clearly demonstrated.' [Citation.] We are required to accept all factual findings of the trial court that are supported by substantial evidence." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.)

Here, substantial evidence supports the trial court's finding that defendant entered his plea freely and voluntarily, and not as a result of ineffective assistance of counsel. Defendant asserted, in substance, that he "want[ed] to be able to prove [his] innocence" and that he involuntarily entered the plea because of defense counsel's failure to obtain the attendance of his witnesses for trial. However, defense counsel explained to the court his difficulty in contacting the witnesses based on the information provided by defendant. As we have repeatedly noted, the court did not abuse its discretion in finding that defendant failed to demonstrate ineffective assistance. Moreover, in pleading no contest defendant confirmed that he was doing so freely and voluntarily. The court did not abuse its discretion in denying the motion to withdraw the plea and in determining, in essence, that

defendant had simply shown "buyer's remorse." (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.)

In a single sentence in his reply brief, defendant asserts, for the first time, that his waiver of the right to counsel for the purpose of making his motion was defective because he was not given adequate advisements under *Faretta v. California* (1975) 422 U.S. 806. Besides the lack of any substantive analysis, he has forfeited the contention because he failed to raise this issue in his opening brief. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) In any event, "in the unusual situation facing the court an elaborate catalogue of dangers and pitfalls was unnecessary." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1225 [involving capital defendant requesting self-representation in order to request the death penalty].) Defendant waived counsel solely for the purpose of making his motion to withdraw his no contest plea. In that isolated context, the dangers and disadvantages of representing himself were obvious. In connection with his no contest plea, he had been advised of the maximum possible punishment, had confirmed he understood, and had also confirmed that he had discussed the possible defenses with his attorney. He also clearly knew that if he prevailed on his motion, he would go to trial and could receive up to maximum sentence of 21 years if convicted. On this record, defendant was "sufficiently aware of the dangers and disadvantages of self-representation and made his decision with open eyes." (*People v. Bloom, supra,* 48 Cal.3d at p. 1225.)

Finally, any error in failing to make a sufficient *Faretta* advisement was harmless beyond a reasonable doubt. (*People v. Wilder* (1995) 35 Cal.App.4th 489, 502 [when a waiver of the right to counsel is voluntary, the failure to provide adequate advisements on the dangers and disadvantages of self-representation is subject to harmless error analysis under *Chapman*].) Even had defendant received

an extensive *Faretta* advisement, the record demonstrates that he still would have chosen to represent himself, because that was his only legal option to have his motion heard.

DISPOSITON

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.